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Supreme Court, U. S.
F I L E D

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No. 96-6133

**In The
Supreme Court of the United States
October Term, 1996**

WILLIAM BRACY,

Petitioner,

vs.

**RICHARD GRAMLEY, Warden
Pontiac Correctional Center,**

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

BRIEF FOR THE PETITIONER

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26 pp

QUESTION PRESENTED FOR REVIEW

Whether a habeas petitioner who was convicted of a capital offense and sentenced to death in a trial before a judge who admittedly accepted bribes in other contemporaneous criminal cases is entitled to discovery to support his claim that he was denied the right to trial before a fair and impartial judge?

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	ii
OPINIONS BELOW.....	1
STATEMENT OF JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	10
ARGUMENT	11
PETITIONER'S PROFFER OF A PATTERN OF JUDICIAL CORRUPTION OCCURRING CONTEMPORANEOUSLY WITH PETITIONER'S CAPITAL TRIAL WAS A SUFFICIENTLY SPECIFIC SHOWING TO REQUIRE THE ISSUANCE OF A DISCOVERY ORDER	11
CONCLUSION	21

TABLE OF AUTHORITIES

	Page
CASES	
<i>Aetna Life Insurance Company v. Lavoie</i> , 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1985).....	15
<i>Beck v. Alabama</i> , 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980).....	19
<i>Blackledge v. Allison</i> , 431 U.S. 63, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977).....	12
<i>Bracy v. Gramley</i> , 81 F. 3d 684 (7th Cir. 1996)....	<i>passim</i>
<i>Brecht v. Abrahamson</i> , 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1973).....	16
<i>Coleman v. Zant</i> , 708 F. 2d 541 (11th Cir. 1983)	13
<i>East v. Scott</i> , 55 F. 3d 996 (5th Cir. 1995).....	13
<i>Gardner v. Florida</i> , 430 U.S. 349, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977).....	19
<i>Harris v. Nelson</i> , 394 U.S. 286, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969).....	11, 12
<i>Herrera v. Collins</i> , 506 U.S. 390, 122 L. Ed. 2d 203, 113 S. Ct. 851 (1993).....	12
<i>In Re Murchison</i> , 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955).....	14, 15
<i>Lockett v. Ohio</i> , 438 U.S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978).....	19
<i>People v. Collins</i> , 196 Ill. 2d 237, 478 N.E. 2d 267 (1985)	2
<i>People v. Collins</i> , 153 Ill. 2d 130, 606 N.E. 2d 1137 (1992)	2
<i>Teague v. Scott</i> , 60 F. 3d 1167 (5th Cir. 1995).....	12

TABLE OF AUTHORITIES – Continued

Page

<i>Tumey v. Ohio</i> , 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927)	13, 14, 15
<i>U.S. Ex Rel. Collins v. Wellborn</i> , 868 F.Supp. 950 (N.D. Ill. 1994)	3, 6, 9
<i>United States v. Armstrong</i> , ___ U.S. ___ L. Ed. 2d ___, 116 S. Ct. 1480 (1996)	13, 18
<i>Vasquez v. Hillary</i> , 474 U.S. 254, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986)	15, 16
<i>Ward v. Monroeville</i> , 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972)	14, 16
<i>Ward v. Whitley</i> , 21 F. 3d 1355 (5th Cir. 1994)	12
<i>Woodson v. North Carolina</i> , 428 U.S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976)	19

MISCELLANEOUS

Fourteenth Amendment to the United States Constitution	1
Title 18 United States Code, § 1962(c)	6
Title 28 United States Code § 1254(1)	1, 2
Advisory Commission Note to Rule 6 Governing § 2254	12
Federal Habeas Corpus Rule 6(a)	1, 10, 11, 12, 21

OPINIONS BELOW

The opinion of the Court of Appeals (J.A. 73-118) is reported at 81 F. 3d 684 (7th Cir. 1996). The opinion of the District Court is reported at 868 F.Supp. 950 (N.D. Ill. 1994).

STATEMENT OF JURISDICTION

On April 12, 1976, the United States Court of Appeals for the Seventh Circuit entered its opinion affirming the judgment of the District Court to dismiss the Petition for a Writ of Habeas Corpus. *Bracy v. Gramley*, 81 F. 3d 684 (7th Cir. 1996). The Petition for Rehearing and Suggestion for Rehearing en banc was denied on June 26, 1996. The Petition for a Writ of Certiorari was timely filed on September 24, 1996, within ninety days of the order denying rehearing. The Supreme Court's certiorari jurisdiction is properly invoked pursuant to Title 28 United States Code § 1254(1).

CONSTITUTIONAL PROVISIONS
AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

... nor shall any state deprive any person of life, liberty, or property without due process of law; nor to deny any person within its jurisdiction the equal protection of the laws.

Federal Habeas Corpus Rule 6(a) provides:

A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for the petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).

STATEMENT OF THE CASE

The Petitioner William Bracy and Roger Collins were tried jointly in the Circuit Court of Cook County, Illinois before former Judge Thomas Maloney and a jury on charges of murder, armed robbery and kidnapping. The jury found them guilty on all counts and sentenced them to death. Both Petitioner and Collins then jointly appealed their convictions and sentences to the Illinois Supreme Court and the judgments were affirmed. *People v. Collins*, 196 Ill. 2d 237, 478 N.E. 2d 267 (1985). Mr. Bracy and Mr. Collins then filed a joint petition in the Cook County Circuit Court pursuant to the Illinois Post Conviction Hearing Act (Ill. Rev. Stat. ch. 38, para. 122-1 et seq., 1985). The denial was affirmed by the Illinois Supreme Court. *People v. Collins*, 153 Ill. 2d 130, 606 N.E. 2d 1137 (1992).

On August 31, 1993, William Bracy filed a Petition for a Writ of Habeas Corpus pursuant to Title 28 United States Code § 2254 in the United States District Court for the Northern District of Illinois, Eastern Division. Mr.

Bracy's case and a separate case involving Roger Collins were both assigned to the Honorable William T. Hart. On August 24, 1994, Judge Hart entered an order dismissing both petitions and denying the requests for discovery and an evidentiary hearing. *U.S. Ex Rel. Collins v. Wellborn*, 868 F.Supp. 950 (N.D. Ill. 1994). Petitioner appealed the judgment of the District Court to the United States Court of Appeals for the Seventh Circuit. The judgment of the District Court was affirmed by the Court of Appeals. *Bracy v. Gramley, supra*.

The Petitioner, his co-defendant, Roger Collins, and another individual, Murray Hooper, were indicted for armed robbery and murder of Frederick Lacy, R.C. Pettigrew, and Richard Holliman. Hooper was tried separately. The State presented evidence that on November 12, 1980, Lacy, Pettigrew and Holliman were taken from an apartment at 2240 South State Street in Chicago, driven to a viaduct at Roosevelt Road and Clark Street, and shot to death. TR 463, 465-473, 773-777. All three were bound with rope and killed by shotgun blasts and gun shots. *Id.*

The principal witness against Petitioner and Collins was an individual named Morris Nellum, who pleaded guilty to a reduced charge and was sentenced to a term of probation. TR 525. Nellum testified that he went to the apartment at 2240 South State Street and observed Collins, Petitioner and Hooper in the company of the victims. TR 491. The victims were subsequently taken from the apartment and placed in a red Oldsmobile. TR 501. Collins asked Nellum to follow them in a brown Cadillac. TR 496, 497. When Nellum arrived at the viaduct at Roosevelt and Clark, he heard shotgun blasts. TR

510, 511. He then saw Petitioner and Hooper get into Petitioner's car and Collins get into the Cadillac with Nellum, and they all drove off. *Id.* Petitioner was carrying a sawed-off shotgun. *Id.* Later, Nellum accompanied Collins, who threw the two handguns into Lake Michigan. TR 514-517.

A witness testified that she saw the Petitioner in the parking lot of the apartment building on South State Street in the company of one of the victims. TR 412, 413, 422, 433. Another witness, Christina Nowell, testified that Petitioner took a 38 caliber Charter Arms revolver from her and he later told her that he murdered some people and threw her hand gun in the Chicago River. TR 632-646, 649, 650. A Charter Arms revolver and a 357 Ruger handgun were recovered from Lake Michigan by police divers, after they were led there by Nellum. TR 518, 519. The guns were too rusty to allow for an exact ballistics comparison. TR 678-702. However, the serial number on the Charter Arms revolver was the same as the one that was registered to Nowell. TR 655, 666. Two pieces of rope were found in the apartment at 2240 South State Street, and they had the same characteristics as the rope which was used to bind the victims. TR 602-608, 617, 620, 760, 761.

Both Petitioner and Collins presented alibi defenses. Petitioner called his sister, Barbara Harris, who testified that he had dinner with her and her husband on the evening of November 12, 1980. TR 1056-1066. Collins called his girlfriend, Beatrice Mack, and several other witnesses, who testified that Mack and Mr. Collins spent the evening and afternoon together on November 12. TR 969-975, 1022-1-26, 1031-1035, 1043, 1047. Both Petitioner

and Collins testified on their own behalf and other witnesses were called by the defense to impeach Morris Nellum. TR 809, 863-864, 911-953, 1104-1110, 1147-1148.

The jury elected to disbelieve the defense witnesses and to believe Morris Nellum and returned guilty verdicts on all counts. In a separate sentencing proceeding, the Petitioner and Mr. Collins were sentenced to death.

Thomas J. Maloney was the Cook County Circuit Court Judge who presided over Petitioner's trial. In this capacity, Judge Maloney made a number of discretionary rulings that potentially affected the outcome of Petitioner's case. He appointed Robert McDonald, the attorney who represented Petitioner throughout the trial and penalty phase. TR 32. Over objection, he excused the only African American panel member for cause. TR 101. He denied co-defendant Roger Collins' motion to suppress evidence. TR 388. He declined to give any of the proposed instructions offered by the defense, including those dealing with the credibility of the accomplice. TR 1207-1214. He declined to grant Roger Collins' request for a separate penalty hearing. TR 1433. He declined to grant a short continuance prior to the commencement of the penalty phase although Petitioner's counsel announced that he was not ready to proceed. TR 1425, 1447. Over objection, he admitted evidence of an unadjudicated homicide in Arizona involving Petitioner. TR 1494, 1503. As the Seventh Circuit dissent observed, he made a number of other discretionary rulings that had a potential cumulative impact on the outcome of Petitioner's trial, including rulings on the credibility of witnesses, evidentiary rulings, and rulings to permit the attorneys for the

State to make objectionable arguments to the jury. *Bracy v. Gramley*, 81 F. 3d at 704, fn. 3.

In June, 1991, Thomas Maloney was himself indicted for bribery, racketeering and income tax evasion for acts committed while he held judicial office. (J.A. 16-35) The attorney representing Petitioner in state post-conviction proceedings attempted to raise a claim based upon Maloney's misconduct in the final stages of the post-conviction appeal, when the information first became public. *U.S. Ex Rel. Collins v. Wellborn*, 868 F.Supp. 991. However, the Illinois Supreme Court declined to consider it. *Id.* In his Federal Habeas Corpus Petition, Petitioner pleaded a due process violation based upon judicial corruption. (J.A. 5, 6) Petitioner alleged that most of Judge Maloney's discretionary rulings at trial were made in favor of the state, and that Judge Maloney had a reputation for being a strict judge who was "partial to law and order". *Id.* Petitioner alleged that there is cause to believe that Judge Maloney's discretionary rulings may have been influenced by a desire on his part to allay suspicion. *Id.* The State responded that since there was no evidence that Judge Maloney had been bribed in Petitioner's case, there was no reason to believe that he was unfair. (J.A. 7-9)

In the Reply to the State's response to the Petition for Habeas Corpus, Petitioner pointed out that Judge Maloney's pattern of corrupt activities on the bench occurred during the time of Petitioner's trial. (J.A. 11) Petitioner requested discovery and an evidentiary hearing. *Id.* In connection with this request, Petitioner tendered a copy of the Maloney indictment. (J.A. 16-35) In Count II of the indictment, Defendant Maloney was charged with racketeering pursuant to Title 18 United States Code,

§ 1962(c). (J.A. 26-32) Five of the predicate acts supporting the RICO count consisted of soliciting and taking bribes to fix criminal cases. *Id.* Four of these cases occurred in 1981 and 1982, around the time of Petitioner's trial. *Id.* In another instance, Maloney took a bribe and granted an acquittal in a multiple defendant homicide case, one month after Petitioner's trial. (J.A. 27) Petitioner presented evidence that Judge Maloney generally had a reputation as being prosecution oriented.¹ Petitioner also presented evidence that Judge Maloney accepted a bribe to fix a murder case in October 1980, and thus his pattern of judicial misconduct began well in advance of Petitioner's trial. (J.A. 36, 37)

During oral argument in the District Court, Petitioner's counsel indicated in greater detail the discovery that was being sought. (J.A. 41-43) He requested the opportunity to review the transcript of Judge Maloney's trial and to depose the Government witnesses who might be able to provide material information on Judge Maloney's behavior in those cases in which he was not bribed.² *Id.* He requested the opportunity to do an analysis of Judge Maloney's rulings to see if there were any

¹ According to a newspaper account of the Maloney trial, attorney William Swano testified, upon being first informed that Judge Maloney was willing to receive bribes, that he was incredulous because, "Judge Maloney was so prosecution oriented . . . I wanted to hear it from the horse's mouth". (J.A. 36)

² The transcript of the *Maloney* trial was sealed and was not unsealed until August 1994, the same month that the District Court announced its decision dismissing the Petition. *See, Bracy v. Gramley*, 81 F. 3d at 691.

discernable patterns. *Id.* He requested reasonable access to the material in the hands of government lawyers who were responsible for the Maloney prosecution. *Id.*

Following oral argument, but before the District Court decided the case, Mr. Collins through his counsel made a supplemental motion for discovery in connection with the Maloney claim. (J.A. 50, 51) In this motion, Collins proffered that Petitioner's court appointed counsel, Robert McDonald, was reported to be the former law partner of Maloney. *Id.* Attached to the motion as an exhibit was the government's sentencing memorandum in the Maloney case. (J.A. 52-72) The memorandum stated that, "Thomas Maloney's life of corruption was considerably more expansive than that proved at trial". (J.A. 54) The memorandum noted that years before he became a judge, Maloney was a criminal defense lawyer who regularly paid bribes to fix criminal cases. (J.A. 55-59) In one instance, he was part of an effort to pay a bribe to secure an acquittal for La Cosa Nostra hit-man Harry Aleman, on a homicide charge. (J.A. 60-66) Maloney himself was involved with La Cosa Nostra and may have secured his judicial appointment with the assistance of his organized crime connections. (J.A. 66) The Government's sentencing memorandum noted that while on the bench, Maloney accepted bribes in a number of cases other than those mentioned in the indictment. (J.A. 66-68) The memorandum indicated that as part of its investigation, the Government did a statistical analysis of some of Judge Maloney's rulings.³

³ The Government's memorandum makes reference to one Herbert Barsy, a corrupt attorney who regularly practiced

The District Court ruled that Petitioner and Mr. Collins did not make an adequate showing to justify discovery because, "They do not point to any particular adverse ruling that would have been favorable to them before another judge". *United States Ex Rel. Collins v. Wellborn*, 868 F.Supp. at 991. In upholding the denial of discovery by the District Court, the Seventh Circuit majority faulted Petitioner's counsel for not conducting their own statistical analysis of Judge Maloney's rulings in this and other cases, and for not seeking to support their discovery motion with excerpts of the transcript in the *Maloney* case, although it acknowledged that the transcript was sealed until August 1994, when the District Court in this case announced its decision. *Bracy v. Gramley*, 81 F. 3d at 691. The Court of Appeals however did have access to transcript when it wrote its opinion, and thus the dissent was able to point out at least one instance where according to the testimony of William Swano, a witness who cooperated with the Government, Judge Maloney unexpectedly convicted a defendant in a weak prosecution case, after Swano opted not to pay him a bribe. *Bracy v. Gramley*, 81 F. 3d at 697. The testimony was that this was the only case that Swano ever lost in front of Judge Maloney, and Swano viewed this as an object lesson that bribes were essential to successful practice in Judge Maloney's court.

before Judge Maloney, and goes on to state, "... a review of computer printouts listing all of Barsy's felony cases before Judge Maloney reveals that Barsy obtained not guilty results in all six of the cases he had before Judge Maloney". (J.A. 67)

SUMMARY OF ARGUMENT

In the District Court, in support of his discovery request, Petitioner presented evidence of pervasive corruption on the part of the judge who presided over his trial. This included but was not limited to the numerous times in which Judge Maloney accepted bribes to fix cases while he was on the bench and his earlier career as a "fixer" lawyer with close ties to organized crime. This was a sufficiently specific showing under Federal Habeas Rule 6(a) to have required the District Court to grant discovery, particularly since the Due Process standard articulated by this Court does not require a showing of actual prejudice. Court sanctioned discovery was necessary in this case because most of the pertinent information was in the hands of Government lawyers, who were involved in the prosecution of Judge Maloney at the same time that this Habeas Petition was pending in the District Court, and the information in their possession would not have been made available to Petitioner's counsel, absent a court order. Discovery is also required in this case because of the need for greater reliability and fairness in proceedings involving imposition of the death penalty.

ARGUMENT

PETITIONER'S PROFFER OF A PATTERN OF JUDICIAL CORRUPTION OCCURRING CONTEMPORANEOUSLY WITH PETITIONER'S CAPITAL TRIAL WAS A SUFFICIENTLY SPECIFIC SHOWING TO REQUIRE THE ISSUANCE OF A DISCOVERY ORDER.

The discovery request in this case is governed by Habeas Corpus Rule 6(a) which in pertinent part provides:

A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

The leading decision on discovery in Federal Habeas Corpus cases is *Harris v. Nelson*, 394 U.S. 286, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969). This Court held in *Harris* that the Federal Rules of Civil Procedure do not apply automatically in habeas corpus cases. However, applicants for habeas corpus are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of relevant facts. 394 U.S. 298. District Courts may fashion appropriate procedure for development of the facts, including where appropriate the ordering of discovery. *Id.* at 299. With respect to the showing that must be made in order to justify a discovery order, the Court stated as follows:

We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are

aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. *But where specific allegations before the court show reason to believe that the petitioner may, if facts are fully developed, be able to demonstrate that he is confined illegally and is therefore, entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for adequate inquiry.* *Id.* at 300. (emphasis supplied).

Although *Harris* was decided before the adoption of Rule 6, it is cited in the Advisory Commission Notes in support of the proposition that discovery may be employed to aid in developing the facts necessary to decide whether to order an evidentiary hearing. *See*, Advisory Commission Note to Rule 6 Governing § 2254 cases. The decision in *Blackledge v. Allison*, 431 U.S. 63, 81, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977) adopts the Advisory Commission interpretation. Discovery pursuant to Rule 6 is proper whenever it would help the court make a reliable determination with respect to the prisoner's claim. *Herrera v. Collins*, 506 U.S. 390, 402, 122 L. Ed. 2d 203, 113 S. Ct. 851 (1993).

Following this Court's decisions in *Harris* and *Blackledge*, lower Federal Courts have provided additional gloss on the standard applicable to consideration of discovery requests under Habeas Rule 6(a). A Rule 6(a) discovery request may be properly denied if supported only by conclusory allegations. *Ward v. Whitley*, 21 F. 3d 1355 (5th Cir. 1994). However, denial of a discovery request is an abuse of discretion if discovery is necessary to develop the facts of the claim. *Teague v. Scott*, 60 F. 3d 1167 (5th Cir. 1995). A blanket denial of discovery is an abuse of discretion if discovery is "indispensable to a fair

well rounded development of the facts". *East v. Scott*, 55 F. 3d 996, 1001 (5th Cir. 1995), citing *Coleman v. Zant*, 708 F. 2d 541, 547 (11th Cir. 1983).

In deciding whether to permit discovery, a court should be informed by the legal standard applicable to resolution of the underlying constitutional claim. *United States v. Armstrong*, ___ U.S. ___, ___ L. Ed. 2d ___, 116 S. Ct. 1480 (1996). Development of the legal standard applicable to judicial bias claims began with this Court's decision in *Tumey v. Ohio*, 273 U.S. 510, 523, 71 L. Ed. 749, 47 S. Ct. 437 (1927). In *Tumey*, this Court held that it violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case. The Court noted that the common law rule was that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in resolving the subject matter which he was to decide, rendered the decision voidable. *Id.* at 524. This Court stated, "There was at the common law the greatest sensitivity over the existence of any pecuniary interest, however small or infinitesimal, in the justices of the peace." *Id.* at 525. Writing for the Court in *Tumey*, Chief Justice Taft noted that with only slight modification, the common law rule was embodied in the due process clause of the Fourteenth Amendment. *Id.* at 531. The Court went on to state:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to

hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Id. at 532 (emphasis supplied).

The Court concluded in *Tumey* that the right to disqualify a judge, based upon pecuniary interest, existed regardless of the strength of the evidence against the accused. *Id.* at 535.

Following the decision in *Tumey*, this Court in *In Re Murchison*, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955), recognized that due process guarantees did not simply protect against actual bias, but that "... a possible temptation to the average man as judge . . .", would suffice. The Court stated:

Such a stringent rule may sometimes bar trial by judges who have no actual bias and who do their very best to weigh the scales of justice equally between the contending parties. But to satisfy its high function in the best way "justice must satisfy the appearance of justice."

Id. at 136 (emphasis supplied).

The strict rule of *Tumey* and *Murchison* was applied in *Ward v. Monroeville*, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972), wherein the village mayor also sat as judge in cases involving ordinance violations and traffic offenses, and the village's revenues were derived in large measure from fines assessed as a result of these violations. The Petitioner was convicted of a traffic offense and this Court reversed the conviction on due process grounds even though, as pointed out by the dissent, "The Ohio

mayor who judged this case had no direct financial stake in its outcome". 409 U.S. at 62.

Tumey and *Murchison* were also followed in *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1985). There, an Alabama Supreme Court judge was disqualified to decide a case pending before him on appeal, where he was also a plaintiff in another case involving similar issues of law. This Court noted that it was not required to decide whether the Judge had actually been influenced since it was sufficient to determine that there was a "possible temptation". *Id.* at 825. In reversing the State Court judgment, this Court stated:

Because of Justice Embry's leading role in the decision under review, we conclude that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings.

Id. at 828 (emphasis supplied).

In *Vasquez v. Hillary*, 474 U.S. 254, 263, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986), this Court noted that when the judge has a possible interest in the proceeding, there arises a presumption of prejudice. The Court stated:

When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had *some* basis for rendering a biased judgment, his actual

motivations are hidden from review, and we must presume that the process was impaired.

Id. at 263 (emphasis supplied).⁴

The rule that emerges from this Court's decisions on judicial bias is that a possible temptation to the "average man" is sufficient to establish a due process violation, and, as pointed out in *Ward*, Petitioner need not show that Judge Maloney had a direct financial interest in the outcome of this case. Once a possible temptation is established by the evidence, prejudice is presumed. The Seventh Circuit majority applied an incorrect legal standard in holding that Petitioner was not entitled to discovery because Petitioner could not show that the discretionary rulings of Judge Maloney in this case were the product of improper motive and judicial corruption. *Bracy v. Gramley*, 81 F. 3d at 691. In essence, the Seventh Circuit majority ruled that regardless of what it might uncover, an investigation would be futile simply because there was no suggestion that Judge Maloney accepted a bribe in this particular case. Petitioner made a preliminary showing that Judge Maloney was under a temptation to rule corruptly at the time of Petitioner's trial, because at the same time he was actively soliciting and accepting bribes to fix murder cases. This is sufficiently suggestive of a possible due process violation to justify issuance of a discovery order.

⁴ The presumption of prejudice that arises in instances of judicial bias is tantamount to those structural defects in the trial mechanism which defy harmless error analysis, such as that arising from denial of the right to counsel. *Brecht v. Abrahamson*, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993).

The granting of discovery was necessary in this case because there was no fact finding conducted in the state court and the information Petitioner was seeking is known to others and was unlikely to be made available absent a discovery order.⁵ Petitioner made a preliminary showing of a pattern of corruption on the part of Thomas Maloney, including taking bribes in return for not guilty verdicts in murder cases at the same time as he sat as trial judge in Petitioner's case, and additional information from the Government indicating that the scope of judicial corruption extended well beyond the evidence presented in Maloney's criminal trial. In addition, there is evidence in the transcript of the Maloney trial that on at least one occasion Judge Maloney rendered a guilty verdict in a weak prosecution case as a means of advertising his desire to obtain bribes. This demonstrates a reasonable likelihood that formal discovery will uncover additional facts supporting a due process violation.

In the District Court, Petitioner sought to depose the accomplices who testified for the Government in the Maloney criminal trial. These witnesses were familiar with the day to day workings of the system in Judge Maloney's Court, and were likely to have significant insight as to the extent of the judicial corruption as well as the manner in which it affected cases in which Maloney did not receive bribes. In addition, these witnesses were

⁵ Referring to the Government witnesses who testified in the Maloney criminal trial, the Seventh Circuit dissent observed, "But it is likely that no one is going to talk without a subpoena, and petitioners should not be deprived of that instrument". *Bracy v. Gramley*, 81 F. 3d at 699.

familiar with events surrounding the bribe taking that occurred simultaneously with Petitioner's trial, and were in a position to give a precise account of what transpired during this period of time. Petitioner also sought to review witness statements and other information in the possession of the Government, as this material would enable Petitioner to identify others who possibly possessed relevant information.

In considering whether the District Court should have allowed these requests, it is useful to contrast this case with this Court's decision in *United States v. Armstrong, supra*. There the Court held that it was proper to deny discovery to defendants claiming a denial of equal protection because the Government had singled out African Americans for selective prosecution in crack cocaine cases. One reason that discovery was denied in that case was because there is a presumption of regularity supporting prosecutorial decisions. 116 S. Ct. 1486. In contrast, there is no presumption of honesty and integrity with respect to the rulings of Thomas Maloney, as the Seventh Circuit conceded in its opinion. *Bracy v. Gramley*, 81 F. 3d at 688. In addition, this Court in *Armstrong* was concerned about the tremendous burden that a discovery order would place upon the government in selective prosecution cases, and hence it required a "correspondingly rigorous standard for discovery in aid of such a claim". 116 S. Ct. 1488. In this case, discovery will involve a burden that is significantly less since Petitioner is mainly seeking access to the government's file in the Maloney criminal case, and the materials sought have already been assembled in connection with a prosecution that is now complete.

Finally, Petitioner's sentence of death further supports the conclusion that in the unique circumstances of this case, he is entitled to discovery on his due process claim. Because the penalty of death is "qualitatively different" from any other sentence, *Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976), this Court has required heightened standards of reliability in the procedures involved both in the imposition of the death penalty and at the trial stage of a capital case. *Beck v. Alabama*, 447 U.S. 625, 637-638, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978). Because of the severity and finality of the death penalty, the Court has recognized that:

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

Beck v. Alabama, supra, at 637-638, quoting *Gardner v. Florida*, 430 U.S. 349, 358, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977) (opinion of Stevens, J.) (emphasis supplied).

The decision of the Seventh Circuit majority denying discovery does not comport with the requirements of heightened reliability in capital cases. In support of his discovery request, the Petitioner presented undisputed evidence that his trial and death penalty hearing were presided over by a corrupt judge who was actively engaged in accepting bribes to fix murder cases, evidence which the majority opinion acknowledged created an "appearance of impropriety". *Bracy v. Gramley*, 81 F. 3d at 690. In these circumstances, the heightened concern for reliability and the appearance of fairness in capital cases

mandates that the Petitioner not be executed without a full opportunity to investigate and prove his claim that he was denied his due process right to a trial before an impartial judge.

Throughout its history, this Court has exemplified the highest standard of judicial integrity and the rulings of this Court reflect a deep concern for public confidence in the judiciary. Allowing discovery and a full investigation of the facts in this case will send a strong message that this Court remains firmly committed to this view. As the Seventh Circuit dissent correctly observed, "The people of Illinois have as great an interest in the integrity of capital trials as Bracy and Collins do". *Bracy v. Gramley*, 81 F. 3d at 699.

CONCLUSION

The decision of the Court of Appeals should be reversed. This Court should enter an order directing the District Court to permit discovery under Habeas Corpus Rule 6(a).

Respectfully submitted,

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